

Fair treatment when people exit a retirement village

Response to NSW Department of Customer Service's
Consultation Paper on retirement village exit arrangements

Joint response from:

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Executive Summary

1. We support the broad direction of the proposed reforms around exit arrangements for retirement villages. However, major changes must be made on the detail of some provisions to achieve the desired outcome.
- 2. Exit entitlement provisions**
 - 2.1. We support the introduction of buy-back provisions for registered interest holders, in line with the minister's commitment.
 - 2.2. Our preference is for the 6 month period to be applied state-wide, rather than having a 12 month period in non-metropolitan areas.
 - 2.3. We support applications for exit entitlement orders being made to the Secretary of the Department.
 - 2.4. The exit entitlement period should run from when the premises are vacant or advertised (whichever comes first). There are steps prior to advertising that can delay the placement of the premises on the market (such as slow refurbishment). It would be completely unacceptable if the 6/12 month period only ran from the date of first advertising.
- 3. Aged care transition**
 - 3.1. We strongly support the introduction of aged care payments.
 - 3.2. We recommend the following aged care rules, depending on what is legislatively possible:
 - 3.2.1. Best option: If the ex-resident requests it, require the RV operator to pay full exit entitlement within 3 months, and pay the DAP in the meantime (up to 85% of predicted exit entitlement). The exit entitlement would be paid via buy-back and (if requested) based on an independent valuation.
 - 3.2.2. 2nd option: If the ex-resident requests it, require the RV operator to pay the DAP (up to 85% of predicted exit entitlement) until the RV unit changes hands. This could be via a buy-back (with independent valuation if requested) or via a private sale.
 - 3.3. We believe a financial hardship provision is unnecessary, as it creates extra administrative burden at a stressful time. Victoria has no hardship clause. If a financial hardship provision is introduced, it needs to be quick and simple. If a hardship rule is introduced, we recommend copying the South Australian rules.
 - 3.4. The age care reforms should allow people to apply for age care daily payments from 1 January 2021 and cover any resident or ex-resident with an unsold RV property. The industry has been on notice since the state election, as this was a clear and unequivocal election commitment in February 2019.
- 4. Recurrent charges**
 - 4.1. We support the 42 day time limit on recurrent charges for all contracts, so they end 42 days (at the latest) after the resident has left.

- 4.2. The trigger date should be when the premises are permanently vacated (eg giving vacant possession to the operator or when the operator could obtain the right to remove former resident's possessions).

The cost of meeting any shortfall in a village budget arising from this provision should be met by the operator of the village. Such cost should be prescribed under s112(3)(b) of the Act to prevent them from being financed by way of recurrent charges

About us

This is a joint submission from people concerned about the interests of residents of retirement villages and senior Australians generally.

Retirement Village Residents Association

The Retirement Village Residents Association NSW represents and supports retirement village residents across NSW. It has more than 6,000 members across NSW.

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Macquarie University

Robert Drake is a researcher and Adjunct Fellow at Macquarie University. He has deep experience in consumer protection and financial literacy. He has held senior positions with NSW Council of Social Service, NSW Department of Fair Trading and the Australian Securities and Investments Commission. Contact: robert.drake@mq.edu.au

Dr Tim Kyng is Associate Professor in the Department of Actuarial Studies and Business Analytics at Macquarie Business School. Dr Kyng's research interests include financial education and literacy, complex financial derivatives, and actuarial analysis of Australian retirement villages. He leads a project on retirement village cost calculator and is also leading a project on the transition from a retirement village to aged care.

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Seniors Legal Service

Seniors Rights Service is a not-for-profit, community legal centre with specialist legal services and aged care advocacy for older people across NSW. Its services include:

- A professional advocacy service for people who are residents in aged care facilities or receive commonwealth funded aged care services and assistance.
- The Older Persons Legal Service provides legal advice and assistance to disadvantaged and vulnerable older persons on a broad range of elder law issues.
- The Retirement Villages Legal Service provides legal advice and assistance to residents of retirement villages and former residents or their legal representatives to resolve any issues with village operators.
- The Strata Legal Service provides legal advice to older people who are owners of a strata unit or townhouse about any aspect of the strata renewal process.
- The community education service provides rights education to older people and their carers, professional carers and the community.

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COTA NSW

COTA NSW is the peak body representing people over 50 in NSW. We're an independent non-partisan, consumer-based non-government organisation. We work with politicians, policy makers, service and product providers as well as media representatives to make sure our constituents' views are heard and their needs met.

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Introduction

We welcome the opportunity to respond to NSW Department of Customer Service's consultation paper on retirement village exit arrangements, published in September 2020.

Our submission comments on:

1. The 42 day cap on recurrent charges
2. The 6 / 12 month buy back provisions
3. The age care transition provisions

Given the previous consultation and the tight timeline to submit the legislation to parliament, we have focused on the key issues.

The overall reforms

It is important to protect the consumer rights of all village residents, particularly the most vulnerable. We support the proposed reforms as one step towards the fairer treatment of retirement village residents (although there is much more to do). These must be implemented promptly to implement the government's promise and to protect both current and future residents.

The reforms (with the variations recommended here) would reduce the chance of the industry's public reputation being damaged again by examples of consumer detriment. Improving the overall reputation of the retirement village industry is a benefit to all operators.

Exit entitlement provisions

We support the reform to require village operators to offer a buy-back after 6 months in metropolitan areas. We would prefer that the proposed 12 month buy-back period for non-metropolitan areas be reduced to 6 months as well.

Independent valuations

The proposals regarding a valuer seem reasonable and necessary.

There will not always be disagreement over a valuation. Recourse to an independent valuation needs only to be offered as a fall-back position where either party, after negotiation, triggers the requirement for an independent valuation. If either part thinks an independent valuation is needed, the cost should be shared equally between resident and operator.

The valuation report should disclose any current or previous relationships between the valuer (or the valuer's company) and interested parties (if an independent valuer could not be found). This should be done by way of statutory declaration and should be prescribed in the regulation.

Note our submission detailed later in this paper that it will be rarely necessary to obtain a professional valuation in relation to the administration of the aged care rule.

Applications for operator to pay exit entitlement

We agree with the Secretary of the Department being the entity that hears applications about whether operators should have to pay the exit entitlement before the unit is sold. This is appropriate given that the consumer is rarely in a position to participate in an adversarial tribunal hearing.

We also agree with the reversal of the onus of proof, as the operator has all the evidence about the steps they have taken to avoid undue delay.

Issues considered should include:

1. whether a lower price has been tested within a range that the owner is willing to accept, as the departing resident may be willing to accept a lower resale price in return for a speedier exit payment.
2. whether the contract terms on offer to an incoming resident have been modified to make the contract more or less attractive – e.g. changing the DMF structure.
3. whether the property has been advertised through retirement village websites and other outlets.
4. whether the operator has sold new or refurbished units when the second-hand unit has remained unsold.
5. whether promised community facilities have been built and maintained.
6. the speed at which renovations have been completed.
7. whether there have been any other delays from the retirement village operator's side.
8. What contract information reports have been previously provided to the resident relating to the market value of the premises pursuant to s69A of the Retirement Villages Act 1999
9. Provide a history of all sales over, say, the last three years.
10. Evidence that the operator has different plans for the future of the village. For example, lack of any maintenance and a general running down of the village. Units for sale growing in number with no evidence of attempts to sell. In these circumstances the values, of course, will decline.

11. Clear disclosure where an operator offers more than one contract plan, that valuations are derived taking full account of each of those options. Some operators offer a choice of contract for a particular unit. These may have different features regarding the deferred management fee and the sharing of capital gains / losses and accordingly the entry fees will be different due to these contract features. The valuer doing the valuation must be required to state the assumptions about the contract features used in their valuation – e.g., that the valuation assumes the entry fee is for the same type of contract as the previous resident had.

Any extension of the buyback period due to operator hardship should be limited, so the maximum period is 6 months.

If the buy-back period is extended due to operator hardship, the operator should pay the ex-resident interest monthly on the outstanding amount.¹ This would follow the precedent of Tasmania for any exit payments² and the current NSW rules for exit payments to non-registered interest holders.³

The trigger point for the buy-back clock

The consultation paper proposes that the trigger point be when the property is advertised for sale [s.182AB (3)]. We view this as completely unacceptable. The steps between a property being vacant and being advertised for sale could often be 2-3 months (or some instances even longer). This means the buy-back clause has been stretched to 9 months in metro areas and 15 months in regional areas.

We agree that the concept of “unreasonable delay” should be confined to matters over which the operator has control or significant influence.

However, there are a number of steps that operator can take to expedite the sale, before the property is advertised. Examples are:

1. Discussing with the family (in a respectful manner) about a timetable for removing a deceased resident’s personal effects, so the family does not unknowingly create a delay in selling the property.
2. The operator taking prompt steps to gain access to the property and remove personal effects if the resident has no family to do it.
3. The operator arranging for reinstatement on a prompt timetable in consultation with family.
4. The operator facilitating the engagement of an agent and preparation for advertising, such as photographs, preparation of unit plans, etc. Sometimes the real estate agent is the operator itself, or an associated company.

The trigger should be the earlier of a number of events, including:

1. 28 days after the resident gives notice that they wish to exit (whether or not they continue to reside there) and that notice is not withdrawn.

¹ The Supreme Court sets a prescribed interest rate which the Tribunal uses.

² Tasmania Retirement Villages Act 2004 s. 13

³ NSW Retirement Villages Act 1999 t ss181 (6)

2. the date they provide vacant possession.
3. 28 days after the resident's death.
4. the date the property is advertised for sale.

Commencement and transition

The Minister for Innovation and Better Regulation, The Hon Matthew Kean, stated in a letter to the Retirement Village Residents Association on 28 February 2019 *"The reform package, set out below, will afford greater protections to current and prospective residents and improve the operation of the sector."* [emphasis added].

By the time the reforms come into force in mid 2021, the industry will have had over 2 years to prepare for the changes. No further delay is needed or acceptable.

The Consultation Paper proposes that the buy-back provisions do not apply to units that were already been advertised for sale when provisions come into force (eg 1 July 2021). This is completely unfair and unacceptable on a critical issue. We believe it will deny the greater protection intended by the reforms. It would mean that people who had been trying to sell their unit for a long time would be excluded from the reforms. These are the people who triggered the enquiry and who most need assistance.

The proposed discrimination in buy-back provisions would also create two categories of properties for sale - ones where the operator might have to buy-back and ones where the operator will never have to buy-back. This creates an incentive for operators to go even slower on existing properties for sale.

The exit entitlement provisions should apply to all properties that fit into any of the following categories:

1. Are vacant as of 1 January 2021 or become vacant after that date
2. Where the unit was advertised for sale as at 1 January 2021 or advertised for sale after that date (to cater for people who remain in their unit during the advertising period).

As a transition arrangement, the 6 or 12 month period for buybacks should start from 1 January 2021. This would mean residents could apply for buybacks from July 2021 in metro regions and January 2022 in regional areas.

The buy backs are only relevant where the operators have caused undue delay in the sale of a property. Operators have plenty of time to refine their processes to avoid causing undue delays. They have been on notice for 18 months already.

We have had discussions with many retirement village operators that have professional processes in place to ensure a fast transition process. This includes having standing arrangements with tradespeople for renovations, tight project management, standard residential contracts already prepared, etc. Other retirement village operators appear to have a much more casual approach, because there is currently no incentive to promptly complete the sale process.

Penalties for failure to implement buy-back

The proposed maximum penalty for non-compliance with the buy-back provisions is \$11,000. This is an increase from the previous proposal of \$5,500. However, penalty is still

not economically significant, given the large amounts of money at stake (\$400,000+) and the detriment to the former-resident. A one-off \$11,000 fine will, in many cases, be cheaper for the operator than the interest they gain from delaying payment of the exit entitlement. For example, a \$500,000 exit payment delayed for 6 months (at 5% interest rate) would save the operator \$12,500. We recommend that penalties for delay be on a continuing basis, ie that a further penalty be applied each and every day until the payment is made. This would provide a better incentive for operators to avoid delaying the exit payment.

In contrast, in Tasmania the maximum penalty for a failure to repay an exit entitlement on time is \$58,800.⁴

Finer detail

Section 182AB (1) and (2) should refer to both “former occupants” and “residents who have given notice that they wish to depart permanently”. Some residents stay in the retirement village while their unit is advertised for sale.

Section 182AB (4) says that an occupant can only apply for their exit entitlement 30 days after the valuation is done. This clause delays the process unnecessarily and should be deleted. The valuation is only necessary to allow the exit entitlement to be calculated.

Section 182(1) (b) We oppose the option of instalment payments of an exit entitlement. The former-resident is likely to need the lump sum to buy into alternative accommodation or pay a RAD in aged care.

New section 182AE – This section should be deleted. The issue of an extension only arises if a former resident applies for an exit entitlement order. The Secretary has the authority to extend the 6/12 months under section 182AD.

Aged Care rule

The context of transition to aged care

People leaving a retirement village to enter aged care are extremely vulnerable. People’s average age would be in mid-80’s, they generally have limited mobility and ill-health, and often have a degree of cognitive decline (such as dementia). Their need to move to aged care is often urgent. These are extremely vulnerable people in a highly stressful situation. It is critical that the system protect these most vulnerable consumers and not hindered from entering aged care by delays in RV exit payments.

A person entering aged care will have to quickly make a decision when a vacancy arises. They also have to decide whether they can afford a particular aged care facility, as the fees

⁴ Tasmania Retirement Villages Act 2004 s. 12

vary. After entering an aged care facility, the person only has 28 days to decide whether they want to pay via a large refundable bond (a RAD) or a daily payment (a DAP).

We are advised that the average Residential Accommodation Deposit (RAD) is around \$420,000. If a person cannot pay the RAD, they must pay the equivalent Daily Accommodation Payment. For the average RAD, the equivalent DAP is \$17,222 per year (\$47.17 per day). This amount is on top of the basic care fee of \$52.25 per day that everybody pays (85% of the single person rate of the Age Pension), a means-tested care fee (depending on income and assets) and other living expenses.

Introduction of the aged care rule

We strongly support the provision of the aged care rule. To function effectively, the process needs to be simple and quick.

We propose a simple, quick mechanism for the aged care rule, by adapting the Victorian provisions:⁵

1. Upon request from an RV resident or ex-resident entering or in an aged care facility, the RV operator to pay the exit entitlement within 3 months. The exit entitlement would be paid via operator buy-back and (if requested) based on an independent valuation.
2. If the RV operator claims it cannot afford to do the buy-back within 3 months, it can apply to the Tribunal to extend the period to 5 months.
3. If the resident requests it, the RV operator must also pay the Daily Accommodation Payment to the aged care facility, until:
 - the exit entitlement is paid,
 - the person is no longer a resident of the aged care facility,
 - the DAP payments reach 85% of the estimate refund amount,
 - the person receives their RV refund, or
 - the person requests they stop,whichever comes first.

Daily Accommodation Payments would be deducted from the former-resident's exit entitlement. The cost to the operator is very modest (see example).

Example of RV operator making daily aged care payments.

If the aged care facility had a RAD of \$500,000, the equivalent daily payment would be about \$56 a day. If the operator made these payments for 3 months, the interest bill (@ 6% interest) would only be \$75.

The DAP payments for up to 3 months are important, if legislatively possible. Many RV residents rely on the age pension and have only a small cash reserve (eg \$5,000 to 10,000).

⁵ Victorian Retirement Village Regulations – Regulation 7. In a nutshell, the Victorian provisions are:

- If the aged care resident wants to pay a RAD lump sum, then, upon request, the RV operator must pay the RAD.
- If the aged care resident wants to pay by DAP payments, then, upon request, the operator must pay the DAPs.
- If the operator claims it cannot afford to pay the RAD, it can apply to the Tribunal to pay the DAP instead.
- All payments are capped at 85% of the ex-resident's refund entitlement.

Even if they knew they were getting their RV refund in 3 months, they would struggle to afford the DAP payments in the interim leaving them financially deprived for quality of care.

We accept that the aged care rule cannot apply where one person is in aged care and their partner is still living in the retirement village. The aged care rule can apply if neither of the members of a couple are in the village and at least one of the members is in aged care.

The aged care rule should apply to both registered and non-registered interest holders, if there is a risk of a delay of more than 28 days in getting their RV exit payment.

Valuation

A valuation is not necessary at the outset; this only slows the process. A valuation is only necessary when the aged care payments are approaching 85% of the likely refund or the former-resident requests it as part of the buy-back process.

Financial hardship

We believe a financial hardship provision is unnecessary, as it creates extra administrative burden at a stressful time. Most RV residents do not have a large reserve of liquid assets to pay a RAD. Victoria has no hardship clause. We understand there has only ever been one application in S.A. by an operator alleging that the consumer had made an application for aged care payments but could afford to pay it themselves.

If a financial hardship provision is introduced, it needs to be quick and simple. The current financial hardship proposal is unacceptable:

1. The primary decision currently lies with the RV operator. The operator has a conflict of interest on decisions about paying the aged care fee, as they retain use of the money in the short term. Many residents will not want to give details of their private finances and personal circumstances to the operator. Nor should they have to. Indeed, a requirement for them to do so would run counter to the principle established in s66(2) of the Act which is intended to protect the resident's right to privacy and protection against harassment and intimidation.
2. "Financial hardship" is not defined in any way. The decision revolves around the operator's subjective view about whether the resident would be in financial hardship.
3. The appeal process to the Tribunal is useless in practice. Few if any aged care residents would have the capacity to make an application to the Tribunal. Even if they have family to make the application for them, the process is too slow and unhelpful.

If a hardship clause is adopted, it needs to be simple and quick for all parties. We suggest the South Australian approach. This allows the operator to make an application to the Tribunal if they believe it is unnecessary to apply to age care rule, after seeing the Services Australia summary of the resident's income and assets.

Industry impact

The impact of the proposed reforms will be small.

The Consultation Paper (p.18) asserts that 60% of people exiting retirement villages transition directly to aged care. This seems misleading or wrong. At age 90 (above average life expectancy), less than 30% of people are living in aged care.⁶ Anecdotal evidence from villages supports a figure of less than 30% of residents exiting to enter aged care.

Commencement and transition

The aged care rule should apply to:

1. Any person who was an RV resident on or after 1 January 2021 and where an exit payment has not yet been paid on the unit they lived in AND
2. Any person at the time the law comes into effect (1 July 2021) who had been a RV resident, an exit payment has not yet been paid on the unit they lived in, and the person is currently an aged care resident or proposes entering aged care.

This second clause has been added because there will be people in aged care who are still waiting for an exit payment and who are now in financial hardship because their liquid funds are running out.

RV operators have been on notice about the aged care reforms for a considerable time. They have plenty of time to prepare for the minor impact.

Time-limit on recurrent charges

We support the proposal that the time duration for recurrent charges being levied is limited to 42 days after the resident has left. The former-resident gets little benefit from these fees, and has no say in how the money is spent. The time-limit could even be shorter.

The whole tenor of these reforms is to provide a significant level of protection for residents who are departing a retirement village against “unreasonable delay” by an operator in the on-selling of the residence right. The concept of 6/12 month buy-back requirements and the cap on recurrent charges have been created entirely to provide an incentive for operators to avoid unreasonable delay. Once the 42-day cap has been applied, it is essential that the incentive to settle the exit entitlement without delay be maintained by mandating that liability for any resulting shortfall in the village budget rests with the operator. This must be made clear by prescribing that such shortfall may not be financed by way of recurrent charges (s112(3)(b) of the Act).

Seniors Rights Service has seen several cases where consumers have been bankrupted because the recurrent fees that accumulated since they left the village are greater than their exit entitlement.

The ‘trigger’ to commence the 42-day period should be the date upon which vacant possession is given to the operator or the date upon which the operator could gain approval to remove any goods left in the premises by the former resident (whichever is earlier).

⁶ <https://www.health.gov.au/resources/publications/eighth-report-on-the-funding-and-financing-of-the-aged-care-industry-july-2020>, page 108.